



Touro Law Review

Volume 8 | Number 1

Article 14

1991

Confrontation Clause

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Recommended Citation

(1991) "Confrontation Clause," *Touro Law Review*. Vol. 8 : No. 1 , Article 14.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol8/iss1/14>

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would clearly benefit from allowing them to testify by closed circuit television, the court determined that the expert's assessment failed to satisfy the particularization requirement set forth in *Coy v. Iowa*⁹⁷ and *People v. Cintron*.⁹⁸ In *Henderson*, because the defendant's confrontation rights were not adequately protected, the appellate court ordered a reversal of defendant's conviction and remanded the case for retrial.

People v. Costa⁹⁹
(decided April 16, 1990)

The defendant, convicted of endangering the welfare of a child, contended that his confrontation rights under the state¹⁰⁰ and federal¹⁰¹ constitutions were violated when the trial judge, pursuant to article 65.00(2),¹⁰² ruled that the complaining child witness was "vulnerable,"¹⁰³ thus permitting him to testify by use of two-way closed-circuit television. The court held that the defendant's confrontation rights under the state and federal constitution were violated.¹⁰⁴

The trial court based its ruling solely on observations of the child while he testified in court and while he was present in an *in camera* conference.¹⁰⁵ The court observed that the child cried

97. 487 U.S. 1012 (1988). For a more detailed discussion of the federal law on this case, see *supra* notes 62-67 and accompanying text.

98. 75 N.Y.2d 249, 551 N.E.2d 561, 552 N.Y.S.2d 68 (1990).

99. 160 A.D.2d 889, 554 N.Y.S.2d 930 (2d Dep't), *appeal denied*, 76 N.Y.2d 786, 559 N.E.2d 685, 559 N.Y.S.2d 991 (1990).

100. N.Y. CONST. art. I, § 6.

101. U.S. CONST. amend. VI.

102. N.Y. CRIM. PROC. LAW § 65.00(2) (McKinney Supp. 1991); see *supra* notes 39-52 and accompanying text for a discussion of article 65 provisions.

103. *Id.* ("'Vulnerable child witness' means a child witness whom a court has declared to be vulnerable."); see *supra* notes 44-48 and accompanying text for a discussion of what constitutes "vulnerable."

104. *Costa*, 160 A.D.2d at 890, 554 N.Y.S.2d at 931.

105. *Id.* at 889, 554 N.Y.S.2d at 931. "A judicial proceeding is said to be heard *in camera* either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom." BLACK'S LAW DICTIONARY 760 (6th ed. 1990).

while on the witness stand and was reluctant to answer questions regarding the incident. Furthermore, the child stated he did not like being in the courtroom and was frightened by all of the people present in the courtroom. Lastly, the court noted that the child held on to his grandmother. Based on these observations, the trial court ordered, over defendant's objection, that the child be permitted to testify by two-way closed-circuit television.¹⁰⁶

On appeal, the appellate court held that the defendant's confrontation rights under both the state and federal constitutions were violated.¹⁰⁷ The court relied on *People v. Cintron*,¹⁰⁸ holding that the trial judge's determination of the child's vulnerability based upon its own observations failed to satisfy the clear and convincing evidence standard as required by article 65.¹⁰⁹ Similar to *Cintron*, the court found that the defendant's confrontation rights were unconstitutionally abridged because the trial court failed to call any witnesses who could provide legal evidence that the child would likely suffer extreme mental or emotional harm if called upon to testify in the presence of the defendant. Since the state failed to properly demonstrate that the child was in need of article 65¹¹⁰ protection, the appellate court reversed the defendant's conviction.¹¹¹

*People v. Guce*¹¹²
(decided August 27, 1990)

The defendant, convicted of first degree rape, first degree sodomy, first degree sexual abuse, incest, and endangering the welfare of a child, contended that his right to confront witnesses, as guaranteed under the state¹¹³ and federal¹¹⁴ constitutions, was

106. *Costa*, 160 A.D.2d at 889, 554 N.Y.S.2d at 931.

107. *Id.* at 890, 554 N.Y.S.2d at 931.

108. 75 N.Y.2d 249, 551 N.E.2d 561, 552 N.Y.S.2d 68 (1990).

109. *Costa*, 160 A.D.2d at 890, 554 N.Y.S.2d at 931.

110. N.Y. CRIM. PROC. LAW § 65.10 (McKinney Supp. 1991).

111. *Costa*, 160 A.D.2d at 890, 554 N.Y.S.2d at 931. For a discussion of the federal law on this issue, see *supra* notes 62-73 and accompanying text.

112. 164 A.D.2d 946, 560 N.Y.S.2d 53 (2d Dep't), *appeal denied*, 76 N.Y.2d 986, 565 N.E.2d 524, 563 N.Y.S.2d 775 (1990).

113. N.Y. CONST. art. I, § 6.